



18TH DISTRICT  
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MICHIGAN HOUSE OF REPRESENTATIVES

**KEVIN HERTEL**  
STATE REPRESENTATIVE

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January 25, 2021

The Honorable Jocelyn Benson  
Secretary of State  
c/o Bureau of Elections  
Richard H. Austin Building – 1st Floor  
430 West Allegan Street  
Lansing, Michigan 48918

Re: Declaratory Ruling Request — Purchase of Personal Protective Equipment, Ballistic Vests,  
and Home Security Systems as Incidental Expenses Permitted by MCL 169.221a

Dear Secretary Benson:

As provided in Section 15(1)(e) and (2) of the Michigan Campaign Finance Act, MCL 169.201 *et seq.* (“the MCFA”), and in Rule 169.6 of the Michigan Administrative Code, I am writing to request a declaratory ruling as to whether personal protective equipment (“PPE”), a ballistic vest, and a home security system may be purchased by a candidate committee of a candidate who is elected to elective office as an expenditure for incidental expenses of such office, as permitted by MCL 169.221a. I note that Section 15(2) requires that, if the Department of State refuses to issue the requested declaratory ruling, it must issue an interpretative statement providing an informational response to the questions presented herein within the same time limitations applicable to a declaratory ruling. Given the gravity of the issues animating this request, I believe that a ruling is both necessary and appropriate.

**Statement of Facts**

1. On November 3, 2020, I was elected to serve my third term as State Representative for the 18<sup>th</sup> District. As such, I am the holder of an “elective office,” as defined in MCL 169.205.
2. As required by MCL 169.221, I formed a candidate committee—Committee to Elect Kevin Hertel; Committee ID # 517236—to accept contributions and make expenditures in assistance of my election to the House of Representatives.
3. As State Representative, I have a duty to attend legislative session and committee meetings, held at the state capital in Lansing, to represent my constituents by voting on the bills and resolutions brought before the House for consideration. Moreover, the Standing Rules of the House of Representatives empower the House to compel my attendance at such sessions. See Rule 66.

4. Since March 10, 2020, Michigan has been savaged by the novel coronavirus (“COVID-19”), a contagious respiratory disease, not previously identified in humans, that can result in serious illness or death. As of this writing, over 538,000 cases of COVID-19 have been identified in Michigan and over 13,800 Michiganders have lost their lives to this pandemic disease, including my colleague, State Representative Isaac Robinson of Detroit.
5. Despite repeated efforts by the House Democratic Caucus over the course of the last ten months, the House of Representatives has not made any meaningful provision for State Representatives to participate remotely in committee or legislative session by electronic means. As a result, in order to perform my basic duties as State Representative—voting in committee and legislative session—I must be physically present at the State Capitol.
6. Physical presence at the State Capitol exposes my colleagues and me to an undeniable risk of exposure to COVID-19. Numerous legislators and staff have already tested positive for the virus.<sup>1</sup>
7. The House of Representatives COVID-19 Preparedness and Response Plan- (“the Response Plan”) provides, in relevant part, that: “Members of the House are strongly encouraged to wear face coverings while in public areas of the Capitol and House Office Building and for the duration of House session and committee meetings.” The Response Plan further provides that: “Employees are required to wear a face covering in public areas of the Capitol and House Office Building, including during session and committee meetings.”
8. COVID-19, regrettably, is not the only threat to health and safety that my colleagues and I, as State Representatives, encounter daily while performing the duties of our offices at the State Capitol. The threat of gun violence is also ever-present. This threat was illustrated most starkly when scores of heavily armed “protestors” descended on the State Capitol on April 30, 2020 and attempted to storm the Floor of the House of Representatives.<sup>2</sup>
9. While the Michigan State Capitol Commission has recently adopted a policy that purports to ban openly carrying firearms in the State Capitol building, it does not prohibit concealed carry within the Capitol and both open and concealed carry are

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<sup>1</sup> Jonathan Oosting, *At least 12 Michigan lawmakers and 37 staffers have had COVID-19*, Bridge Michigan, December 9, 2020, <<https://www.bridgemi.com/michigan-government/least-12-michigan-lawmakers-and-37-staffers-have-had-covid-19>> (accessed January 18, 2021).

<sup>2</sup> Craig Mauger, *Protestors, some armed, enter Michigan Capitol in rally against COVID-19 limits*, Detroit News, April 30, 2020, <<https://www.detroitnews.com/story/news/local/michigan/2020/04/30/protesters-gathering-outside-capitol-amid-covid-19-restrictions/3054911001/>> (accessed January 18, 2021).

permitted in the Anderson House Office Building, including during legislative committee hearings. As a result, the threat of gun violence directed at legislators is a regrettable feature of serving as State Representative.

10. During my service as State Representative, I have received numerous threats of injury or death directed at my person, my home, and my family. Armed protests at public officials' homes have become a regular occurrence and State Representatives have had to call law enforcement to their homes in response to such threats.<sup>3</sup>
11. But for serving in the elective office of State Representative, neither I nor my colleagues would be exposed to regular, persistent threats of violence—whether committed with a firearm or otherwise.
12. Given the threats of violence—armed and otherwise—and of COVID-19 that I face daily as a State Representative, I desire to take appropriate safety and security measures that will allow me to perform the essential duties of my office. These measures include a desire to purchase PPE (e.g., masks), a ballistic vest, and a home security system. Other legislators have already undertaken such measures,<sup>4</sup> but a significant question remains as to whether they or I may pay for these necessary measures—as incidental office expenses—using candidate committee funds.
13. Whether I am able to move forward with the purchase of PPE, a ballistic vest, and a home security system is dependent, in part, upon whether such purchases can be made using candidate committee funds. Because my course of action related to these expenditures would be affected by the issuance of the requested declaratory ruling, I am an “interested person” within the meaning of R 169.6.

## **Discussion**

The MCFA provides broad, but not unlimited, authorization for incumbent office holders to use candidate committee funds to pay for ordinary and necessary expenses incurred in carrying out the business of their elective office—called incidental office expenses. MCL 169.221a provides, in relevant part, that “[a] candidate committee of a candidate who is elected or appointed to an elective office may make an expenditure for an incidental expense for the elective office to which that candidate was elected or appointed.” As a State Representative, I am a “candidate who is elected . . . to an elective office” and thus eligible

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<sup>3</sup> Madeline Halpert, *Michigan officials faced violent threats well before U.S. Capitol siege*, Bridge Michigan, January 7, 2021, <<https://www.bridgemi.com/michigan-government/michigan-officials-faced-violent-threats-well-us-capitol-siege>> (accessed January 18, 2021).

<sup>4</sup> Paul Eagan, *Michigan legislators worried about maskless GOP lawmakers, lack of gun control at Capitol*, Detroit Free Press, January 13, 2021, <<https://www.freep.com/story/news/politics/elections/2021/01/13/michigan-capitol-guns-coronavirus/6652079002/>> (accessed January 18, 2021).

to make incidental office expense expenditures from my candidate committee, if the expenditures in question meet the statutory definition of “incidental expense.”

The MCFA defines “incidental expense” as:

[A]n expenditure that is an ordinary and necessary expense, paid or incurred in carrying out the business of an elective office. Incidental expense includes, but is not limited to, any of the following:

- (a) A disbursement necessary to assist, serve, or communicate with a constituent.
- (b) A disbursement for equipment, furnishings, or supplies for the office of the public official.
- (c) A disbursement for a district office if the district office is not used for campaign-related activity.
- (d) A disbursement for the public official or his or her staff, or both, to attend a conference, meeting, reception, or other similar event.
- (e) A disbursement to maintain a publicly owned residence or a temporary residence at the seat of government.
- (f) An unreimbursed disbursement for travel, lodging, meals, or other expenses incurred by the public official, a member of the public official’s immediate family, or a member of the public official’s staff in carrying out the business of the elective office.
- (g) A donation to a tax-exempt charitable organization, including, but not limited to, the purchase of tickets to charitable or civic events, as long as the candidate is not an officer or director of or does not receive compensation, either directly or indirectly, from that organization.
- (h) A disbursement to a ballot question committee.
- (i) A purchase of tickets for use by that public official and members of his or her immediate family and staff to a fund-raising event sponsored by a candidate committee, independent committee, political party committee, or a political committee that does not exceed \$100.00 per committee in any calendar year.
- (j) A disbursement for an educational course or seminar that maintains or improves skills employed by the public official in carrying out the business of the elective office.
- (k) A purchase of advertisements in testimonials, program books, souvenir books, or other publications if the advertisement does not support or oppose the nomination or election of a candidate.
- (l) A disbursement for consultation, research, polling, and photographic services not related to a campaign.
- (m) A fee paid to a fraternal, veteran, or other service organization.
- (n) A payment of a tax liability incurred as a result of authorized transactions by the candidate committee of the public official.
- (o) A fee for accounting, professional, or administrative services for the candidate committee of the public official.

- (p) A debt or obligation incurred by the candidate committee of a public official for a disbursement authorized by subdivisions (a) to (o), if the debt or obligation was reported in the candidate committee report filed for the year in which the debt or obligation arose.

MCL 169.209(1)

The present statutory provision, Section 21a, was added to the MCFA by 1994 PA 411. Prior to the adoption of that amendatory act, an elected public official was permitted to establish an officeholder expense fund. These funds were to be used for “expenses incidental to the person’s office.” MCL 169.249 (repealed by 1999 PA 224). To implement the MCFA’s officeholder expense fund provision, the Secretary of State promulgated an administrative rule, R 169.62, that defined an expense as incidental if it was “traditionally associated with, or necessitated by, the holding of a particular public office.” The rule further established that a disbursement that qualified as “an ordinary and necessary business expense of a public official as a public official as authorized by the internal revenue code of 1986, 26 U.S.C. § 1 *et seq.*” was presumed to be a permissible incidental expense for an officeholder expense fund.

Owing to concerns raised about the misuse of officeholder expense funds, these funds were subsequently eliminated by the Legislature and replaced by incidental office expenses, a type of permissible expenditure by a candidate committee, as authorized by MCL 169.221a—the MCFA provision at the heart of this request for a declaratory ruling. Initially, the Legislature, in adopting Section 21a, largely codified the provisions of R 169.62 and explicitly defined incidental to mean “an ordinary and necessary expense, as described in section 162 of the internal revenue code of 1986, 26 U.S.C. 162[.]” However, in 2012, the Legislature amended Section 21a to expand the scope of permissible incidental office expenses by striking the reference to the federal internal revenue code. 2012 PA 275.

The Legislature has demonstrated its intent to provide a broad, but not unlimited, scope of permissible incidental office expenses by removing both the requirement that such expenses be “traditionally associated with, or necessitated by, the holding of a particular public office” and the definitional reference to 26 USC 162. While, as noted above, Section 9(1) includes sixteen examples of permissible incidental office expenses, the definition specifically notes that incidental expenses are “not limited to” these examples. Additionally, as was previously and correctly noted by the Attorney General: “[T]he Legislature’s use of the word ‘business’ as opposed to ‘duties’ in section 9(1) connotes an intent to include a broad category of expenses[.]” 1 OAG, 2009-2010, No. 7,240, p 95, at n 22 (December 15, 2009).

Whether the purchase of PPE, a ballistic vest, and a home security system falls within the scope of permissible incidental office expenses depends on whether such expenditures are both “ordinary” and “necessary” to “carrying out the business of an elective office”—namely that of State Representative. In Michigan, “[t]he touchstone of legislative intent is the statute’s language.” *People v Gardner*, 482 Mich 41, 50; 753 NW2d 78, 84–85 (2008). If

statutory text is “clear and unambiguous,” we are to “enforce the statute as written.” *Id.* (internal quotation marks omitted).

Neither “ordinary” nor “necessary” are legal terms of art in the MCFA. Both must be accorded their plain meaning. Merriam-Webster Unabridged (online ed 2020) defines “ordinary” as “of a kind to be expected in the normal order of events: routine, usual” and “necessary” as “absolutely needed: required.” As outlined in the Statement of Fact accompanying this discussion, the twin threats of COVID-19 transmission and gun violence are ever-present and unavoidable at the state capital—on the floor of the House of Representatives, in House committee rooms, in the House Office Building, and throughout the capitol complex. A legislator cannot perform the basic duties of their office—voting in committee and in legislative session—without confronting these threats daily. Unfortunately, while I wish it were not so, these threats and the need to address them are “to be expected in the normal order of events” when serving in the office of State Representative. One need only open any newspaper on any given day to see that. The fact that it is disturbing, even shocking, that serving in our Legislature now comes with the expectation of having to take steps to protect oneself makes it no less ordinary.

Access to PPE, ballistic vests, and other similar protective equipment are the only readily available means of countering the threats posed to legislators as they endeavor to do the People’s business at the State Capitol—“carrying out the business of an elective office.” These precautions are required to ensure the safety of legislators and as such are necessary within the meaning of the MCFA. They are no less necessary, and perhaps more so, than office furniture, pens, and training registration fees. If those purchases qualify as incidental office expenses, so must the tools necessary to keep legislators safe from COVID-19 and gun violence. In addition, PPE, ballistics vest, and other similar protective equipment not only conform to the general definition of an incidental expense under Section 9(1), they also fall squarely within two of the examples of permissible expenses enumerated therein: “(b) A disbursement for equipment . . . or supplies for the office of the public official” and “(f) An unreimbursed disbursement . . . other expenses incurred by the public official, a member of the public official’s immediate family, or a member of the public official’s staff in carrying out the business of the elective office.”

In short, both the plain language of the MCFA and its legislative history support the conclusion that PPE, a ballistic vest, and a home security system all fall squarely within the definition of permissible incidental office expenses that may be incurred by a State Representative’s candidate committee.

### **Questions Presented**

In light of the discussion above, I am requesting a declaratory ruling on the following questions:

January 25, 2021

- (1) In order to protect themselves from the threat of COVID-19 and gun violence present at the State Capitol, may a State Representative use candidate committee funds to purchase (a) PPE, (b) a ballistic vest, or (c) similar protective equipment as incidental office expenses?
- (2) May a State Representative use candidate committee funds to purchase (a) PPE, (b) a ballistic vest, or (c) similar protective equipment for their legislative staff as an incidental office expense?
- (3) May a State Representative use candidate committee funds to purchase and maintain a home security system during their term of office as an incidental office expense?

For the reasons stated in this request, I believe the answer to each of these questions should be "Yes."

Should you require any supplemental information or facts to issue the requested declaratory ruling, please do not hesitate to contact me. I appreciate your timely consideration of this pressing matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Kevin Hertel", with a stylized flourish at the end.

Kevin Hertel  
State Representative  
Michigan House of Representatives

KH/nat